Supreme Court, U.S.
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No. 03-642

IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, *et al.*,

Petitioners,

v.

KAREN PACHECO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Contrary to Petitioners' position, the issue herein is relatively simple and was properly resolved by the Colorado Supreme Court in accordance with applicable principles of law. The issue below concerned whether the Petitioners were entitled to specifically enforce a provision requiring arbitration of medical malpractice disputes contained in the insurance contract between Karen Pacheco's ("Pacheco") deceased husband and Kaiser Foundation Health Plan of Colorado ("Kaiser"), since the arbitration provision violated the requirements of the Colorado Health Care Availability Act ("HCAA"). The Colorado Supreme Court held that enforcement of the insurance contract between Mr. Pacheco and Kaiser constituted the "business of insurance," and that the HCAA, to the extent it regulated the enforceability of a provision of the Kaiser insurance contract, was a law enacted for the purpose of regulating the "business of insurance." Both of these holdings follow well-settled law. Contrary to Petitioners' argument, the Colorado Supreme Court did not devise a new test to decide this case. Pet. 9.

NO ISSUE RAISED BY THE PETITION WARRANTS REVIEW

The issue raised by the Petitioners is whether the Colorado Supreme Court correctly held that the Federal Arbitration Act ("FAA") was reverse-preempted by the first clause of section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012. In order for the McCarran-Ferguson Act to reverse-preempt a federal statute, three things must be shown, *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999), as follows:

1. The federal statute being preempted does not specifically relate to the "business of insurance." In this case there is no dispute that this first requirement has been met, since the FAA does not specifically relate to the "business of insurance." Petitioners do not dispute the satisfaction of this requirement.

2. The state law was enacted for the purpose of regulating the "business of insurance." The Colorado Supreme Court found that this requirement was satisfied. Petitioners' argument is solely based upon this holding.

3. The federal statute operates to invalidate, impair, or supersede the state law. In this case, there is no dispute that the FAA, if it were applicable, would operate to invalidate, impair, or supersede the HCAA requirements regarding an enforceable arbitration agreement in a health insurance contract.

The second element of McCarran-Ferguson reverse-preemption discussed above contains two components, which must, in turn, be separately analyzed. The first inquiry is whether a particular activity is part of the "business of insurance." If the answer to this first inquiry is yes, then a second, separate and distinct inquiry is necessary – whether the state law in question was enacted for the purpose of regulating the "business of insurance." *Owensboro National Bank v. Stephens*, 44 F.3d 388, 3922 (6th Cir. 1994), *cert. denied*, 517 U.S. 1119 (1996). The fundamental fallacy of Petitioners' contentions and argument is that they confuse

and mix these two separate questions.[1] While the factors set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), may, in some circumstances, be relevant in first clause cases to the threshold inquiry regarding whether the subject practice/activity constitutes the "business of insurance," they have no applicability to the question of whether a state law was enacted for the purpose of regulating the "business of insurance."

Since the issue herein concerns the enforceability of a provision contained in the Kaiser insurance contract[2], no issue exists regarding whether the subject activity (enforcement of a provision of the insurance contract) constitutes the "business of insurance." Thus, Petitioners' argument regarding the failure of the Colorado Supreme Court to specifically discuss the *Pireno* factors is nothing more than a red herring.

Petitioners' arguments regarding the second inquiry, *i.e.*, whether the HCAA is a state law enacted for the purpose of regulating the "business of insurance," are also fundamentally flawed. The cases relied upon by the Petitioners, such as *American Bankers Insurance Co. v. Crawford*, 757 So. 2d

1. For example, Petitioners incorrectly argue that "the real issue in these first-clause cases is whether the *Pireno* factors guide the court's evaluation of state law." Pet. 17. Petitioners are wrong.

2. Petitioners do not challenge the holding that the Kaiser agreement is an insurance contract, which holding is in accord with prevailing law. *See, e.g., Washington Physicians Service Association v. Gregoire*, 147 F.3d 1039, 1046 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999); *Smith v. PacifiCare Behavioral Health of California, Inc.*, 113 Cal. Rptr. 2d 140, 154 (Cal. App. 2001), *cert. denied*, 537 U.S. 818 (2002).

1125 (Ala. 1999), are factually distinguishable since they concern statutes which prohibit the enforceability of arbitration agreements in **every** contract in the state. The purpose of the Alabama statute is to prohibit the enforcement of arbitration provisions in Alabama contracts. Its intended purpose was not, even in part, to regulate the "business of insurance." The HCAA, in contrast, is much more limited in scope. It is not generally applicable to Colorado contracts. In fact, as recognized in the first part of the Colorado Supreme Court's opinion, Colorado has a strong public policy in favor of the enforceability of arbitration provisions. Pet. App. 4a-11a.

Review of the Colorado Supreme Court's decision is not warranted in this case since not only was the McCarran-Ferguson reverse-preemption issue correctly decided, but, contrary to Petitioners' arguments, no real conflict exists with decisions of other courts, in the context of the issues presented.

ENFORCEABILITY OF A PROVISION OF THE KAISER INSURANCE CONTRACT INVOLVES THE "BUSINESS OF INSURANCE"

The core of the "business of insurance" is the relationship between the insurer and insured, including the interpretation, performance and enforcement of the policy which is or could be issued. *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). While the determination of what constitutes the "business of insurance" can, in some circumstances, be complex, "[t]here can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *United States Department of Treasury v. Fabe*, 508 U.S. 491, 503 (1993). Since the issue in the instant case concerns the actual performance of a term of the Kaiser

insurance contract, there can be no doubt that it falls within the "business of insurance."

Many, if not most, of the cases in which issues have arisen regarding McCarran-Ferguson reverse-preemption under the first clause of section 2(b) do not directly concern the actual performance or enforcement of a particular provision of an insurance contract. Thus, in those cases, unlike the instant case, a threshold determination must be made as to whether the activity or practice constitutes the "business of insurance." The *Pireno* factors may be relevant in making that threshold determination in those cases. They are not relevant in this case.

As this Court made clear in *Fabe*, consideration of the *Pireno* factors in a case concerning the actual enforcement or performance of an insurance contract "would be mere formalism," since all three prongs of *Pireno* are satisfied when the issue concerns the performance or enforcement of the insurance contract. *Fabe*, 508 U.S. at 503-04. That is precisely the case herein.

The federal cases relied upon by Petitioners to support their assertion that there is conflict and confusion in the lower courts over whether and how to apply the *Pireno* factors in cases involving the first clause of section 2(b) do not concern the enforceability of a term of an insurance contract. For example, *Owensboro National Bank v. Stephens*, *supra*, involved a state statute barring bank holding companies from acting as insurance agents; *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998), concerned the question of whether the financing of insurance premiums was part of the "business of insurance;" *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001), concerned whether commercial advertising by an insurance company

constituted the "business of insurance;" *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co. Inc.*, 50 F.3d 1486 (9th Cir. 1995), *cert. denied*, 516 U.S. 964 (1995), concerned whether the McCarran-Ferguson Act precluded the application of RICO to an insurance broker's alleged wrongdoing.

The instant case, therefore, contrary to Petitioners' contentions, does not provide an opportunity for this Court to settle the alleged confusion and conflict, if any, in the lower courts regarding the applicability of the *Pireno* factors to the determination of what constitutes the "business of insurance." Accordingly, review of the Colorado Supreme Court's determination that the enforcement of the arbitration provision in the Kaiser insurance contract constituted the "business of insurance" should be denied.

THE HCAA IS A STATUTE ENACTED FOR THE PURPOSE OF REGULATING THE "BUSINESS OF INSURANCE"

Since enforcement of a term of the Kaiser insurance contract, namely the arbitration provision, involves the "business of insurance," the next inquiry is whether the HCAA, which invalidates this arbitration provision, was enacted to regulate the "business of insurance."[3] The decision

3. A distinction must be made between the "business of insurance" and the business of insurance companies. *SEC v. National Securities, Inc.*, 393 U.S. at 459-60. A further distinction must be made from ERISA cases which only require a state law to regulate "insurance" in order to be saved from preemption. *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. __, 123 S. Ct. 1471, 1476 n.1 (2003). Justice Kourlis confused these concepts in her dissent, where she focused on statutes "aimed at the business of regulating insurance." Pet. App. 28a.

of the Colorado Supreme Court that this provision of the HCAA was enacted to regulate the "business of insurance" was correct, in the circumstances of this case.[4]

The Alabama statute involved in *Crawford* is a general anti-arbitration statute. It applies to **every** contract governed by Alabama law. While the Alabama Supreme Court may have analyzed this general anti-arbitration statute under the *Pireno* factors, which Pacheco submits is incorrect, it reached the correct decision since it is clear that the general anti-arbitration statute was not enacted, even in part, for the purpose of regulating the "business of insurance." It was enacted to prohibit the enforceability of every arbitration provision in Alabama.

Similarly, the anti-arbitration statutes of Texas, New York, Montana, Illinois and Colorado were statutes regulating the general method of handling **every** contract dispute in those states, and were not statutes enacted to regulate the "business of insurance." *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969); *Hart v. Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971).

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4. It must be noted that prior to being faced with this McCarran-Ferguson reverse-preemption issue, the Colorado Supreme Court had occasion to consider the applicability of the HCAA to HMOs. *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1227-28 (Colo. 1996). In that case, the Colorado Supreme Court held that the Colorado legislative mandate was that HMOs must comply with the arbitration provision of the HCAA. The holding of the Colorado Supreme Court in the instant case is consistent with the holding in *Evans* regarding the legislative intent of the HCAA.

In 1975, after the decision in *Hart*, Colorado adopted the Uniform Arbitration Act. Colo. Rev. Stat. §§ 13-22-201, *et seq.* Since the enactment of the Colorado Uniform Arbitration Act in 1975, the Colorado courts have consistently held that the public policy of Colorado is strongly in favor of arbitration, just like the federal policy under the FAA is strongly in favor of arbitration. The Colorado Supreme Court reemphasized in the instant case that Colorado's strong policy is in favor of arbitration by holding that any doubts about the scope of an arbitration clause must be resolved in favor of arbitration. In fact, arbitration must be compelled in Colorado unless a court can say "with positive assurance" that the arbitration clause is not susceptible to any interpretation encompassing the subject matter of the dispute. Pet. App. 5a-6a.

In contrast to the Alabama statute which contains a blanket prohibition against the enforceability of arbitration clauses in any contract, the HCAA does not prohibit arbitration. The HCAA is not an anti-arbitration statute. Rather, the HCAA merely imposes certain requirements before an arbitration clause can be enforced in certain very limited areas, including in health insurance contracts.

Simply stated, laws "aimed at protecting or regulating [the insurer-insured] relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 460. "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

The HCAA regulates the "business of insurance" since it applies to the processing of disputed claims, which has a substantial effect upon the insurer-insured relationship. *Standard Security Life Insurance Co. v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *Smith v. PacifiCare Behavioral Health of California, Inc., supra* at 156-57.

The Ohio priority statute involved in *Fabe* concerned the priorities of creditors' claims in a proceeding to liquidate an insolvent insurance company. This Court held that to the extent the Ohio statute protected policyholders, it was a law regulating the "business of insurance," which had priority over the federal bankruptcy statutes. To the extent, however, the Ohio statute regulated the priority of non-policyholder creditors, it was not a law regulating the "business of insurance," and was preempted by the federal bankruptcy statutes. Thus, this Court held that a state statute could have multiple purposes, some of which did not regulate the "business of insurance." McCarran-Ferguson reverse-preemption was applicable to the extent, and only to the extent, the statute regulated the "business of insurance."

Significantly, this Court in *Fabe* rejected the position of the dissenting judge on the Sixth Circuit Court of Appeals, who believed that the Ohio priority statute was not a law enacted for the purpose of regulating the "business of insurance" since, *inter alia*, it was "not confined to policyholders, but govern[ed] the rights of all creditors." *Fabe*, 508 U.S. at 498. The Petitioners herein make a similar argument – the HCAA is not confined to arbitration clauses in health insurance contracts, but also extends to arbitration clauses in non-insurance contracts with medical service providers. Since no issue herein concerns the enforceability of the HCAA with respect to a non-insurance contract with a

medical service provider, and since a statute enacted for the purpose of regulating the "business insurance" need not be confined to the rights of insurance policyholders,[5] no good reason exists for this Court to review the decision of the Colorado Supreme Court.

CONCLUSION

The Colorado Supreme Court correctly decided the McCarran-Ferguson Act issues in this case. Moreover, even if this Court desired to reconsider the applicability of the *Pireno* factors to cases under the first clause of section 2(b), it should do so in a case which does not involve the enforceability of a term of the insurance contract, since all *Pireno* factors are satisfied in such a case. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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5. A state statute "regulat[ing] the business of insurance" need not be in the form of an insurance code or be an act relating only to insurance in order for McCarran-Ferguson reverse-preemption to apply. *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co., Inc.*, 969 F.2d 931, 934 (10th Cir. 1992), *cert. denied*, 506 U.S. 1001 (1992).